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| **Decision Ref:** | 2018-0136 |
| **Sector:** | Insurance |
| **Product / Service:** | Life |
| **Conduct(s) complained of:** | Rejection of claim - non-disclosure |
| **Outcome:** | Rejected |

## LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

### Background

This complaint concerns the declinature of a claim made by the Complainant under a life cover policy underwitten by the Provider.

### The Complainant's Case

The Complainant's partner took out a life policy with the Provider in 2007. Tragically, in 2012 the Complainant's partner died due to stomach cancer. Thereafter the Complainant made a claim under the policy.

The Provider has declined to pay out on foot of the claim, instead voiding the policy by reason of a material non-disclosure.

The Complainant feels that the decision is incorrect and/or unfair. He states that the cancer which caused his late partner's death is entirely unrelated to the illness that his partner failed to disclose. He feels that a refusal to provide life cover to a person with HIV constitutes discrimination and is thus a breach of his late partner's human rights. He cites other cases where it appears insurance companies may have paid out on foot of claims where material non-disclosure or cause of death may have been in dispute.

The complaint is that the Provider has incorrectly and unreasonably refused to pay benefit to the Complainant under the terms of the policy

**The Provider's Case**

The Provider says that on her claim form the Complainant's late partner did not disclose the fact that she was HIV positive when applying for cover. It states that this fact would have affected its consideration of whether or not to underwrite the policy.

It states that each case must be considered on its own facts/merit and the cases cited by the Complainant are of no relevance to this complaint. It notes that the policy was taken out through a broker, who ought to have advised the Complainants about the consequences of failing to disclose medical history, if this had been in any doubt.

**Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 24 July 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the consideration of additional submissions from the parties:

1. E-mail from the Complainant to this Office dated 10 August 2018,

2. E-mail from the Provider to this Office dated 14 August 2018,

While no error of law or fact was identified in those submissions, I will deal with them in this decision and I now set out my final determination below.

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The principal facts surrounding this claim are not in dispute: the Complainant's partner was diagnosed as being HIV positive in 1987. In 2007 she applied for and was provided with life cover by the Provider. In her proposal form she did not disclose the fact that she was HIV positive. She tragically died in 2012 as a result of metatastic gastric cancer.

**The Policy**

The application form for the policy contained the following note in prominent, bold lettering:

> ***"Please note carefully***
>
> ***Failure to disclose all material facts could render your contract void. Material facts are those, which an insurer would regard as likely to influence the assessment and acceptance of an application for insurance. If you are in any doubt as to whether certain facts are material, such facts should be disclosed. Any changes to the answers given before the cover comes into force must be notified…"***

The Complainant's partner replied "No" to all of the health-related questions posed in the proposal form. Question 9 of the proposal form asks:

> *"Have you tested positive for HIV/AIDS or Hepatitis B or C or have you been tested/treated for other sexually transmitted diseases or are you awaiting the results of any such tests?*
>
> *If Yes, please provide details – for confidentiality these details can be sent to the Chief Medical Officer at [Provider] Head Office [address].*

To which the Complainant's partner answered: *"No"*

By signing the proposal form, the Complainant's partner accepted a declaration which includes the following text:

> *"I/we declare that the answers to the questions on the application whether in my/our handwriting or written by another at my/our dictation are strictly true and complete and that this application and Declaration together with any Statements made by the life/lives to be insured to the Medical Examiner acting for [Provider], or any other insurance company, shall be the basis of the contract".*

It is not in dispute that Complainant was aware she had been diagnosed as being HIV positive when she signed this proposal form. The answer provided in response to question 9 was, therefore, not correct.

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**<u>Material Non-Disclosure</u>**

In *Aro Road & Land Vehicles Limited -v- The Insurance Corporation of Ireland Limited* [1986] IR 403, the Supreme Court held that:

- a contract of insurance requires the insured to disclose every matter which he might reasonably think to be material to the risk against which he is seeking indemnity. In the absence of a specific question, an insurer may not expect disclosure of a matter which he regards as material if a reasonable insured would either not advert to the matter or regard it as immaterial;
- a contract of insurance is one of uberimmae fidei, which means that utmost good faith must be shown by the person seeking the insurance and by the Insurance Company.

The test of materiality in *Aro Roads* is based on what the **insured** would reasonably regard as likely to influence the assessment and acceptance of the risk <u>absent a question directed at a particular fact</u>. In this complaint, question 9 of the proposal form was specifically directed at whether or not the applicant had been diagnosed as being HIV positive. It is very clear and specific.

Answering "No" to a specific question to which the correct answer is "Yes" is a clear breach of an insured's duty of utmost good faith (or "uberimmae fidei").

On the basis of the foregoing, I must accept that the Complainant's failure to disclose her diagnosis of being HIV positive constitutes non-disclosure of a material fact and thus the Provider was entitled on this basis to repudiate the policy.

The Complainant has provided references to other cases in support of his complaint. Each complaint must be considered on its own merits, and the cases supplied by him are not of assistance to his complaint. I can only make my decision on the basis of the evidence available to me in relation to this complaint.

In his submission to this Office of 10 August 2018 the Complainant states "*we are just normal people who are not part of an elitist world and because of that fact we are just brushed aside and our cases mean nothing on any level except matters of the law".* I want to assure the Complainant that this Office deals with each complaint on the merits of the complaint and the evidence provided. The background or status of the complaint has no bearing on the decision reached.

The Complainant has stated that a refusal to provide insurance to a person who is HIV positive constitutes discrimination and is a breach of human rights. He has furnished a WHO fact sheet on health and human rights in support of this proposition.

I have considered the material in this fact sheet. It deals with overt or implicit discrimination in the delivery of health services and promotes a human rights-based approach to health services. It does not have any relevance to insurance.

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Insurance contracts are based on risk and utmost good faith. In order for an Insurance Company to assess the level of risk it is willing to take on and the premium it will charge, it is entitled to have the full information and previous health history, including any pre-existing conditions of the person seeking insurance.

The Complainant feels his partner was discriminated against because she was HIV Positive. I note the question on HIV is only one of 11 questions relating to the health and pre-existing medical history of the applicant. These questions cover a broad range of areas and illnesses.

I do not believe that the Provider is discriminating against the Complainant's partner because of the particular condition she suffered. Rather, its actions are based on the fact that she had a condition was not disclosed.

I note that the Provider issued a cheque in the sum of €2,934.16 to the Complainant in April 2013. This represented a refund of the premium paid on his partner's policy. I welcome this gesture by the Provider. However, I note the cheque does not appear to have been cashed.

On the basis that this refund of fees remains available to the Complainant, I do not uphold this complaint.

The facts of this complaint are tragic and I acknowledge the very difficult position in which the Complainant now finds himself. I appreciate that the Complainant's partner lived a happy and healthy life and ultimately she was lost to cancer, but it is impossible to ignore the fact that an incorrect answer was furnished in response to a specific question in the proposal form. Non-disclosure of pre-existing medical conditions, irrespective of the nature of the condition, are always problematic.

An insurance policy cannot be enforced in such circumstances. Therefore, I do not uphold this complaint.

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**Conclusion**

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**

**GER DEERING**
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

10 September 2018

**Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—**

**(a) ensures that—**

**(i) a complainant shall not be identified by name, address or otherwise,**
**(ii) a provider shall not be identified by name or address,**
**and**

**(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.**